

**Statement of**  
**Harold W. Furchtgott-Roth**  
**Commissioner, Federal Communications Commission**  
**Wednesday, March 25, 1998**  
**at a Hearing before the Subcommittee on Communications**  
**of the Senate Committee on Commerce, Science, and Transportation**

Mr. Chairman and Senators:

I am pleased to testify before this Subcommittee on the implementation of Section 271, a matter of great interest both to Congress and the American public. Section 271 was one of the cornerstones of the Telecommunications Act of 1996. It may not be perfect, but it was crafted with great care, and I believe that it can and will work to provide timely entry of Regional Bell Operating Companies (RBOCs) into long-distance services.

During debate on final passage of the Telecommunications Act in both chambers, there was not widespread dissent on Section 271. Two years ago, practically everyone, even if they had private misgivings, wanted this section to achieve its purpose.

Today, practically everyone still wants this section to work, but private misgivings have turned very public. It is today the subject of much public scrutiny.

It is for that reason that I very much welcome this hearing. I believe that independent agencies such as the FCC should be respectful and deferential to

Congress. Congress writes the laws, and we merely implement them. I have come today to learn from the wisdom of this Committee and the wisdom of this Congress on the proper implementation of Section 271.

## **General observations**

Let me be clear from the outset: I believe that the greatest feature of the Telecommunications Act of 1996 is the opening of all markets to competition. This includes those markets that previously had been closed to specific firms or to firms outside of a regulatory line of business. I believe that history will look back on this Act and make that judgment.

Section 271 is a part of opening up those markets. If I could wave a magic wand, all markets would be open in accordance with the competitive checklist today, and a Section 271 application would be an uneventful exercise with approval a virtual certainty. I have no magic wand, but I am hopeful that we will receive many such applications soon.

If there are problems with the implementation of Section 271, I do not believe that they are the result of bad faith. I have never met anyone who I believe was attempting to obstruct the Section 271 process or impede an application. The RBOCs, States, the Department of Justice, the FCC, and other public and private parties all seem committed to making the process work.

Yet despite the best of intentions, there is a widespread discomfort about the actual implementation of Section 271. In evaluating the implementation of Section 271, I recommend adherence to four simple principles: faithfulness to the law; simplicity of any necessary regulations; open and public proceedings; and

independence of FCC determinations.

## **Faithfulness to the law**

Our overarching responsibility is to be faithful to the Act. The Commission must follow the Act both in general principle and in detail. We must not try to reinvent either principle or detail; legislation is the sole responsibility of Congress, not of independent agencies.

The Commission must follow Section 271 as it is written, particularly the competitive checklist. Of all of the thousands of sections, subsections, paragraphs, and subparagraphs of the Communications Act, the competitive checklist in Section 271 (subparagraph (c)(2)(B)) is the one that Congress singled out by emphasizing that it was to be subject to a strict and narrow interpretation. In paragraph 271(d)(4), Congress specifically provided: "The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)."

The FCC does not write laws. The inability of the Commission to change or to reinvent the law holds true with respect to the entire Act, as with all federal statutes. The Commission should be hesitant even to contemplate altering any portion of law by rule or by other means. The specific admonition from Congress about the competitive checklist in Section 271 should make the Commission tremble at the mere suggestion of altering the checklist.

Section 271, however, is more than just the competitive checklist. The Commission should be faithful to all of its language.

## **Simplicity of Regulation, If Even Necessary**

The Communications Act consists of several hundred pages of often detailed language. Much of the Act does not require substantial or further interpretation.

As I previously noted, the Act is the law as written by Congress. Agency rules and interpretations are useful where specifically required by statute and where they serve to clarify ambiguous or vague statutory language. Generally, simpler rules and interpretations clarify better than complex ones, and shorter rules and interpretations clarify better than lengthy ones.

Section 271 is already one of the longer and more complex sections of the Communications Act. Its length and complexity may reflect Congress' view that the statutory language speaks for itself and needs no further interpretation. Unlike many other sections of the Telecommunications Act of 1996, Section 271 does not require the Commission to engage in any rulemaking, only to make determinations of applications from regional Bell Operating Companies within a 90-day window.

Some observers believe that some or all of Section 271 requires further interpretation and elaboration beyond the statutory language. I am not yet convinced that such interpretations or elaborations are necessary or, indeed, even helpful. Moreover, I am fearful that initiating such a process could result in further delay. To the extent that such interpretations and elaborations are needed, I would urge simplicity: simplicity of language, simplicity of process, and simplicity of interpretation.

There is at times a tendency in Washington to try to resolve issues by writing more rules and regulations. If one could foretell the future with certainty, weigh all of

the costs and benefits accurately, and write rules in one day, this process might have merit. But each 271 application presents unique and unforeseeable circumstances, writing rules takes time and resources, and we cannot today foretell future costs and benefits. I am thus skeptical of efforts to write new regulations for Section 271.

## **Public process**

Public proceedings are a hallmark of American democracy. Individuals interested in a matter know which public officials to contact. In public proceedings, all parties are equally situated. No party has more access than another to information in the proceeding; no party has access to secret or exclusive meetings. Both the record of the proceeding and the resulting decisions are in writing, available to the public.

Public access to proceedings may at times be awkward, time-consuming, and inconvenient. The FCC, however, serves the public, and not visa versa. There must be no secret deals. I hope that any FCC proceeding to review, to interpret, to modify, to explain, or otherwise to consider any Section of the Communications Act, including Section 271, will be a truly open proceeding.

For the past two months, the Common Carrier Bureau has engaged in an *ad hoc* proceeding covering parts of Section 271. It has, I believe, been conducted with the very best of intentions to clarify the FCC's interpretation of parts of the Section. It has been labelled many good things such as "cooperative" and "collaborative;" it has, however, not been an entirely public proceeding. Although there was a public notice of the meetings, they appear to have been a series of private rather than open meetings. There appears to be no written record of what was discussed--or decided, if anything--during these series of meetings. I am not aware of Commission written

records developed during or after the process. And I am not aware of how much longer, and for what purpose, these proceedings will continue. I am concerned that this iterative process may lead to further confusion, frustration, and delay for eventual applicants.

I truly hope that the parties, both inside and outside of the Commission, have learned something useful from this *ad hoc* proceeding. If the purpose is to clarify the *Common Carrier Bureau's* interpretations of Section 271, outside parties may reasonably rely on the process, if not the specific unwritten comments they have received. As far as I am aware, however, the *Commissioners* have not reviewed, much less approved, any Bureau positions taken during the proceeding.

### **Independence of FCC determination**

Section 271 requires the FCC to make the final determination in Section 271 applications. I trust that the Commission can fulfill this responsibility. The Commission review should be independent of the Department of Justice review, and one should not substitute for the other. Likewise, the Commission review should be independent of the State review, and one should not substitute for the other. The Commission review of a Section 271 application by an RBOC should be based on the record in that proceeding and should be independent of any discussions or *ad hoc* proceedings prior to the application.

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In conclusion, let me say that I believe that if the Commission would follow these four principles closely, we would be closer to finding a reasonable test for opening up

the local markets and a test that can be met reasonably soon.

Again I would like to thank you for inviting me here today. It is always a pleasure to have the opportunity to hear from you regarding these issues.